Supreme Court, U. S.
FILED
SEP 25 1979
MICHAEL RODAK, JR., CLERK

No. 79-104

In the Supreme Court of the United States

OCTOBER TERM, 1978

SAVE OUR WETLANDS, INC. (SOWL), PETITIONER

v.

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

CARL STRASS
ROBERT L. KLARQUIST
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-104

SAVE OUR WETLANDS, INC. (SOWL), PETITIONER

v.

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A-102) is reported at 594 F. 2d 862. The opinion of the district court (Pet. App. A-99 to A-101) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1979. The petition for a writ of certiorari was filed on July 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judgment dismissing a complaint on grounds of laches bars a subsequent action asserting the same claims against the same parties.

STATEMENT

This action is a second attempt by petitioner to halt development of a housing subdivision in southern Louisiana. A suit was first brought in 1974 ("*SOWL I*") against 37 individuals, corporations and federal and local government entities. The federal defendants named in the complaint were the United States Army Corps of Engineers, the Environmental Protection Agency, the Department of Housing and Urban Development, and various officers of these agencies (Pet. App. A-81).[1] Extensive findings were made by a Special Master (Pet. App. A-1 to A-58). In an order dated January 27, 1975, the district court adopted the report of the Special Master as its opinion and dismissed the complaint on the ground that it was barred by laches (Pet. App. A-59 to A-65). After the filing of objections, a final order reinstating the January 27 order was entered on February 25, 1975 (Pet. App. A-66 to A-72). The Fifth Circuit affirmed, 549 F. 2d 1021 (1977) (Pet. App. A-78 to A-96). A petition for a writ of certiorari was denied, 434 U.S. 836 (1977).

SOWL maintained that Lakes Maurepas, Pontchartrain, Catherine and Borgne comprise an ecological unit, referred to as the MPCB estuary, that was being threatened by indiscriminate development activities. Specifically, SOWL alleged that the Army Corps of Engineers violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and other statutes, by issuing permits pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, to two private development corporations (Pet. App. A-81 to A-82). One of these corporations, Leisure, Inc., was constructing a real estate development on an area known as Eden Isles. The permit in question was issued to

[1]The Attorney General was not named as a defendant but the complaint requested an order directed against him.

authorize the dredging of a canal to permit boats to pass from Eden Isles West into Lake Pontchartrain (Pet. App. A-86 to A-87). SOWL also sought an order enjoining the St. Tammany Parish Police Jury, a local government agency, from maintaining the levees that separate Eden Isles from Lake Pontchartrain.

On October 15, 1975, while the appeal in *SOWL I* was pending, petitioner initiated this action ("*SOWL II*"). The complaint set forth the same generalized allegations concerning the MPCB estuary as were asserted in the initial action. The complaint again alleged that the St. Tammany Parish Police Jury had illegally constructed and was illegally maintaining the Eden Isles levee system. In fact, as the district court found (Pet. App. A-100 to A-101), the entire second complaint "consists substantially of portions of paragraphs 49 through 68 of the complaint in the first suit." It requests precisely the same relief as was sought against essentially the same defendants[2] in portions of the first complaint.

On July 18, 1978, the district court dismissed the complaint on grounds of res judicata (Pet. App. A-99 to A-101). The court stated: "[T]he sole issue with which the court is concerned is whether the maintenance of the levees and the alleged resultant drainage complained of in this suit was part of the subject matter litigated in the earlier suit. There is no question that it was" (Pet. App. A-100). The court of appeals affirmed (Pet. App. A-102).

[2]Unlike the initial action, where SOWL requested relief directed against the Attorney General but did not name him as a defendant, the second complaint named the Attorney General as a defendant but did not seek any order directed against him.

ARGUMENT

The doctrine of res judicata is an absolute bar to the relitigation of the same cause of action between the same parties. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955). An action is barred by res judicata if a court of competent jurisdiction has previously rendered a final judgment on the merits in a suit involving the same cause of action between the same parties, or those in privity with them. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948).

Petitioner contends (Pet. 12-14) that the judgment in *SOWL I* was not a final judgment "on the merits" because the complaint was dismissed on grounds of laches and the substantive issues (or "merits") presented by the complaint were never reached. This contention is erroneous. The term "merits," when used in reference to res judicata, means a disposition on a legal ground rather than on a technical ground of pleading, practice or form. *Providential Development Co.* v. *United States Steel Co.*, 236 F. 2d 277, 280 (10th Cir. 1956); *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 625 (4th Cir.), cert. denied, 350 U.S. 838 (1955). A judgment dismissing a complaint as untimely is a judgment on the merits for purposes of res judicata. *Mathis* v. *Laird*, 457 F. 2d 926, 927 (5th Cir.), cert. denied, 409 U.S. 871 (1972); *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464, 466-467 (3d Cir. 1950). Were the rule otherwise, a litigant could continue to bring suit indefinitely upon a claim already judged to be too stale to litigate. When a suit is dismissed on the grounds of laches, the same cause of action[3] cannot

[3]Petitioners also allege (Pet. 9-12) that the second cause of action differs from the first in that the first suit was directed solely against developments in Eden Isles West while the present litigation involves only Eden Isles East. This purely factual issue was correctly resolved by the courts below, which held that the second complaint did not raise any new issue. As the district court found (Pet. App. A-100 to A-101), SOWL's first complaint included those developments in Eden Isles East that are the subject of the second complaint; indeed, the *SOWL II* complaint consists almost entirely of portions of the *SOWL I* complaint. The findings and recommendations of the special master clearly covered Eden Isles East (Pet. App. A-36 to A-45, A-55 to A-57).

be brought again in a manner that will cure the defect of laches. Thus, the court in the second case would once again have to consider the previously decided issue of laches. The rule of res judicata prevents such wasteful relitigation. "One trial of an issue is enough." *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 78 (1939).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

CARL STRASS
ROBERT L. KLARQUIST
Attorneys

SEPTEMBER 1979

DOJ-1979-09